No. 18-957

In the Supreme Court of the United States

NEXTERA ENERGY, INC., PETITIONER

v.

ELLIOTT ASSOCIATES, L.P., ET AL.

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner entered an agreement to purchase certain assets from the debtors, under which a $275 million termination fee would "constitute an administrative expense * * * under the Bankruptcy Code." The bankruptcy court initially approved the termination fee, but later reconsidered in part. The court found that it "had a fundamental misunderstanding of the critical facts when it approved" the termination fee, especially that it would be payable in circumstances when it provided "no actual benefit to the Debtors' estate," a prerequisite for approving "administrative expenses" for a bankruptcy estate. On reconsideration, the court struck the part of the fee provision that allowed petitioner, despite failing to obtain regulatory approval for the purchase, to "hold out" and waste the estate's assets, forcing debtors to terminate and trigger the fee. The court of appeals affirmed, finding that the bankruptcy court had misunderstood the struck provision, which was potentially disastrous for the estate. Because application of the "administrative expense" standard to evaluate the termination fee in this case is required by the parties' merger agreement, the petition for certiorari presents the following question:

Whether the court of appeals correctly affirmed the bankruptcy court's fact-based determination that one aspect of the termination fee provision failed to satisfy the "administrative expense" standard specified by the parties' merger agreement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondents respectfully state:

Sempra Energy, a publicly traded California corporation, currently owns more than 10% of reorganized Energy Future Holdings Corp. (EFH). The EFH Plan Administrator Board administers the estate of former debtors in possession, including EFH. No publicly held corporation owns 10% or more of the EFH Plan Administrator Board.

Each of Elliott Associates, L.P., Elliott International, L.P., and The Liverpool Limited Partnership respectfully states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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The question on which petitioner seeks certiorari is not genuinely presented in this case and does not, in any event, warrant the Court's review for numerous reasons: (a) petitioner waived application of the standard it now advocates by contractually agreeing to the standard the courts below applied; (b) there is no circuit split (indeed, the Fifth Circuit disavowed a conflict); (c) the decided cases are all fact-specific, and the highly unusual portion of the termination fee at issue here would be rejected under either standard; and (d) this appeal arises from a motion to reconsider, thus undermining the Court's ability to address cleanly the issue petitioner posits.

To begin, petitioner waived any argument that the "administrative expense" standard was improper when petitioner agreed in the merger agreement that "[t]he Termination Fee, to the extent approved by the Bankruptcy Court, *shall constitute an administrative expense of the [debtors] under the Bankruptcy Code.*" C.A. App. 182 (emphasis added). Petitioner asks this Court to decide whether a debtor's agreement to a break-up fee in an asset sale contract should be reviewed under the standard applicable to property sales, 11 U.S.C. 363, or the purportedly more demanding standard for approving administrative expenses of the estate, 11 U.S.C. 503. Pet. i. But that abstract question is inapplicable to petitioner, who expressly agreed that this termination fee would "constitute an administrative expense * * * under the Bankruptcy Code," C.A. App. 182, thereby invoking the Section 503 standard. Prior to its petition for certiorari, petitioner never argued that the termination fee should be reviewed under the Section 363 business judgment standard instead of Section 503. The question petitioner posits is thus not genuinely presented here.

Apart from petitioner's waiver, there is currently no conflict among the courts of appeals for this Court to resolve. Indeed, the Fifth Circuit, one of the two courts supposedly implicated in the circuit split, explicitly disclaimed expressing any view on whether it would agree with the Third Circuit when presented with the "significantly differ[ent]" factual circumstances addressed in Third Circuit precedent. See *ASARCO, Inc.* v. *Elliott Mgmt. (In re ASARCO, LLC)*, 650 F.3d 593, 602 (2011). Further, while petitioner asks the Court to decide the standard by which bankruptcy courts should evaluate ex ante a termination fee offered to induce a "stalking horse" bidder to engender competing bids, see, *e.g.*, Pet. 16, none of the existing court of appeals cases—including this one—actually presents that scenario. By definition, then, there cannot be a circuit split regarding approval of break-up fees in that paradigmatic context.

In any event, applying a different standard would not alter the outcome, either for the part of the fee the courts approved or the part they rejected. The courts below *approved* a typical break-up fee, just as petitioner contends would happen under a business judgment standard. They rejected only a highly unusual portion of the fee provision that "created substantial financial risk if the PUCT did not approve the transaction" that "had the possibility to be disastrous" for debtors. Pet. App. 32a. Given the courts' determination that the particular provision "would be harmful to the estates," *id.* at 34a, the outcome would have been the same even under a business judgment standard.

The procedural idiosyncrasies of this case further complicate the Court's review. The appeal arises from a motion to reconsider, and that procedural posture is inextricably entwined with petitioner's criticisms of the lower courts' legal analysis. Petitioner repeatedly faults the court of appeals' application of the administrative expense framework under Section 503(b) as impermissibly depending on "after-the-fact assessment." Pet. 4, 5, 19. But some hindsight analysis is inevitable when the bankruptcy court considers a motion for reconsideration based upon its "fundamental[]" misapprehension of the facts at the time of its initial ruling. Petitioner thus asks the Court to speculate as to what part of the court's "after-the-fact" analysis was a product of this case's peculiar procedural posture versus what, if any, is an essential feature of a Section 503(b) analysis.

This is a fact-bound case that the court of appeals called "anomalous" and "unusual." Pet. App. 34a-35a. Unsurprisingly, there is no circuit split regarding the proper result in such "anomalous" circumstances. This Court's review is thus unwarranted even if petitioner had not contractually agreed to the very standard it now challenges.

STATEMENT

A. Debtors' Bankruptcy Cases And The Merger Agreement

The petition arises from the chapter 11 bankruptcy cases of Energy Future Holdings Corp. (EFH) and Energy Future Intermediate Holding Company LLC (EFIH and, with EFH, debtors). EFIH, which is 100% owned by EFH, indirectly owned an approximately 80% economic interest in the rate-regulated business of Oncor Electric Delivery Co. LLC (Oncor), a Texas electricity transmission and distribution system. Pet. App. 60a; C.A. App. 85. Oncor is subject to regulation by the Public Utility Commission of Texas (PUCT). See Pet. App. 4a.

On July 29, 2016, debtors and petitioner entered into an Agreement and Plan of Merger (Merger Agreement) to sell debtors' interest in Oncor to petitioner (NextEra Transaction). Pet. App. 3a. Petitioner agreed to provide approximately $9.5 billion in consideration to debtors' estates. *Ibid.* Finalization of the NextEra Transaction was subject to bankruptcy court approval and regulatory approval from the PUCT. *Id.* at 3a-4a. The Merger Agreement contained a provision entitling petitioner to a $275 million termination fee (Termination Fee) payable by debtors as an administrative expense under certain conditions. *Id.* at 4a-5a. The Merger Agreement provided that "[t]he Termination Fee, to the extent approved by the Bankruptcy Court, shall constitute an administrative expense of the Company and EFIH under the Bankruptcy Code." C.A. App. 182.

On August 3, 2016, debtors moved for authorization to enter into the Merger Agreement and for approval of the Termination Fee (Approval Motion). Pet. App. 5a; see C.A. App. 382-410. As the Merger Agreement contemplated, debtors informed the bankruptcy court that, if the Merger Agreement were approved and debtors became liable for the Termination Fee, the fee would be payable "as an allowed administrative expense claim." Pet. App. 5a (citing C.A. App. 397-398). Debtors did not ask the court to apply the business judgment standard under 11 U.S.C. 363 instead of the contractually agreed "administrative expense" standard of 11 U.S.C. 503(b).[1]

Debtors offered two declarations in support. C.A. App. 411-426. Neither the Approval Motion nor the declarations identified the circumstances under which termination of the Merger Agreement would trigger payment of the Termination Fee, other than the Approval Motion's statement that debtors could solicit "higher or otherwise better offers" and, "[i]f the Debtors terminate the Merger Agreement * * * to accept another proposal," debtors would owe the Termination Fee. C.A. App. 398, quoted at Pet. App. 5a. The motion stated that "[t]he Termination Fee *is not payable* * * * following a

[1] Debtors' reply supporting the Approval Motion confirmed that the motion invoked the Section 503(b)(1) administrative expense standard, as interpreted by the Third Circuit. C.A. App. 431-432.

termination by [petitioner] at the Termination Date * * * where PUCT approval is the only closing condition not satisfied." C.A. App. 397-98 (emphasis added), quoted at Pet. App. 5a.

B. September 19, 2016 Hearing And Approval Order

On September 19, 2016, the bankruptcy court held a hearing to consider the Approval Motion (Approval Hearing). Pet. App. 5a-6a.

At the hearing, the proffer from EFH's Treasurer focused on the possibility that the Termination Fee would be triggered if debtors terminated the NextEra Transaction to pursue an offer superior to petitioner's. The proffer stated that the Treasurer was "confident that the proposed transaction with [petitioner] will close and believe[d] there's a *low possibility that the termination fee will be triggered*" because "[a] bidder would have to come in with a *higher and better offer* that was viable and did not involve a higher execution risk than the NextEra merger," at which point "Debtors would have to exercise their fiduciary out in order *to pursue that superior proposal, thereby terminating the NextEra merger agreement at which point the termination fee would be triggered*." C.A. App. 485 (emphases added). The proffer did not discuss the scenario in which the PUCT declined to approve the transaction, and debtors would have to terminate to stanch their ongoing losses, thereby entitling petitioner to the Termination Fee, even absent a "higher and better offer."

A subsequent colloquy further muddied the waters:

> THE COURT: I actually have a question. * * * And this goes to when the break-up fee is payable in the event there is a regulatory problem.
>
> * * *
>
> So, I read [Sections 8.5(b) and 8.2(a)] to be is—and maybe—is this your understanding that [the] plan gets confirmed, they go to the PUCT, the PUCT shuts it down, and NextEra – or it sets terms on it that NextEra doesn't like, and NextEra terminates, that the break-up fee is not payable?
>
> * * *
>
> [DEBTORS' COUNSEL]: * * * [Y]ou're 100 percent right about if the PUCT denies approval.
>
> * * *
>
> THE COURT: * * * So if they simply disapprove and the parent—and NextEra walks, no break-up fee?
>
> [DEBTORS' COUNSEL]: Correct.

C.A. App. 539-541.

During debtors' expert's testimony, the court returned to the question when the Termination Fee would be payable if the PUCT disapproved the transaction. After some colloquy, the court stated its understanding that if the PUCT "simply disapprove[s]" the transaction "and NextEra walks, no break-up fee?," to which the expert responded "[c]orrect." C.A. App. 541. The expert did not mention petitioner's ability to force *debtors* to terminate in the event of PUCT disapproval, in which case the fee *would* be payable.

Shortly thereafter, while trying to "clarify" the issue, debtors' counsel inadvertently but erroneously stated that PUCT rejection would *not* trigger the Termination Fee. Counsel stated: "[s]uffice to say there's no break-up fee if the PUC[T] just denies – outright denies approval. But if the PUC[T] imposes the burdensome condition which is a significant hurdle, * * * a break-up fee is triggered." Pet. App. 7a (quoting C.A. App. 547). As the court of appeals later noted, counsel's "statement was inaccurate in that the triggering of the Fee did not turn on whether the PUCT outright rejected the merger or instead imposed a 'burdensome condition.'" *Ibid.* "In reality, if the PUCT flat-out rejected the merger, the Fee would be payable, so long as it was the Debtors who terminated." *Ibid.* Petitioner attended the Approval Hearing, C.A. App. 461-462, but did not attempt to clarify the record.[2]

The Approval Hearing left the bankruptcy court with what it later called "a fundamental misapprehension of critical facts" regarding the Termination Fee. Pet. App. 48a-49a. The bankruptcy court did not understand "the reality" of the Termination Fee, which was

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[2] Petitioner repeats the irrelevant assertion that "Elliott * * * never objected when the fee was initially considered." Pet. 7. Elliott was not a creditor of any relevant entity with an economic interest in the NextEra transaction on September 19, 2016. See Elliott C.A. Br. 13, 53-54. Petitioner made similar contentions below, under the doctrine of laches, which the court of appeals rejected. Pet. App. 22a n.3.

that "*under no foreseeable circumstances would [petitioner] terminate the Merger Agreement if the PUCT declined to approve the NextEra Transaction*," because "[petitioner] had the ability to hold out and to pursue numerous motions for reconsideration and a fruitless appeal until the Debtors were forced by economic circumstances to terminate the Merger Agreement" and become liable for the fee. *Id.* at 77a. As the court of appeals explained, "because there was no date by which PUCT approval had to be obtained before the merger dissolved automatically, in the face of regulatory rejection, [petitioner] could simply be patient, pursue all possible appeals, and wait for Debtors to terminate first, which would allow [petitioner] to collect the $275 million Termination Fee." *Id.* at 9a. As of September 19, 2016, however, the bankruptcy court did not appreciate that aspect of the Termination Fee.

Debtors' statements to the bankruptcy court at the Approval Hearing also confirmed that approval of the Termination Fee was sought as an administrative expense under Section 503(b). When counsel for an objecting party argued that "Debtors [were] assert[ing] that the agreement to pay the termination fee should be approved as [an] exercise of the Debtors' business judgment," C.A. App. 569, Debtor's counsel clarified Debtors were asking the court to apply the "503 standard," C.A. App. 574.

After the hearing, the bankruptcy court entered the Approval Order, authorizing debtors to enter into the Merger Agreement and authorizing payment of the Termination Fee "as an allowed administrative expense" on the terms in the Merger Agreement. Pet. App. 94a.

C. September 25 Letter

Three days later, the PUCT held a hearing. "Perhaps due to Debtors' counsel's misstatement at the September 19 hearing before the Bankruptcy Court, [a] Commissioner appeared to be under the false impression that the Fee would be payable if the PUCT imposed burdensome conditions, but not if it outright rejected the merger." Pet. App. 9a; see also C.A. App. 690-691.

In response to the Commissioner's comments, debtors and petitioner submitted a letter to the bankruptcy court seeking to clarify the circumstances in which the Termination Fee would be payable (September 25 Letter). As the court of appeals explained, the letter "corrected part of Debtors' counsel's misstatement from the September 19 hearing, but it did not address the critical related issue: what would happen if the PUCT rejected the merger or approved it with burdensome conditions *and [petitioner] did not terminate*." Pet. App. 10a. Like the debtors' September 19 proffer, the September 25 Letter stated that the Termination Fee was not likely to be triggered because debtors "believe[d] *they would only terminate * * * if they had an alternative proposal to pursue*," whereas "[t]he termination fee is not triggered if, *under the same circumstances, [petitioner] terminates the merger agreement instead of [debtors]*." *Id.* at 11a (emphases added) (quoting C.A. App. 702).

D. Debtors Are Forced To Terminate The Merger Agreement

On October 31, 2016, Oncor and petitioner applied to the PUCT for approval of the NextEra Transaction. Pet. App. 12a. But, over the ensuing months, petitioner refused to yield on what the PUCT called "deal-killer" terms, which involved a regulatory "ring-fence" that the PUCT required for Oncor. *Ibid.* On April 13, 2017, the PUCT denied the application. *Ibid.* Petitioner filed a reconsideration motion and sought an extension to "the maximum extent allowed by law—effectively July 22, 2017." *Id.* at 63a (internal quotation marks and citation omitted). The PUCT denied the reconsideration motion; petitioner sought reconsideration again, and on June 29, 2017, the PUCT denied that motion, too. *Ibid.*

As of the June 29, 2017 ruling, it was absolutely clear that the NextEra Transaction could not be consummated, but petitioner did not terminate the Merger Agreement. Petitioner thus put debtors into the catch-22 about which the bankruptcy court record had been unclear: Debtors could (i) terminate the Merger Agreement and trigger the Termination Fee or (ii) not terminate the Merger Agreement, losing the opportunity to enter another restructuring transaction (even at a lower price), while incurring "months or years of continued interest and fee obligations," Pet. App. 13a (quoting *id.* at 63a)—including $50 million in monthly interest obligations to secured lenders, plus millions in additional fees. C.A. App. 179, 181-182 (§§ 8.3(d), 8.4(g), 8.5(b)); see Debtors' Reply Supp. Mot. Authorizing Merger Agmt. ¶¶ 2, 42 (Bankr. D. Del. Aug. 16, 2017), ECF No. 11761. Failing to terminate the Merger Agreement also increased the risk of liquidation of the estate, in which the Termination Fee would still be payable.

On July 7, 2017, debtors terminated the Merger Agreement. Pet. App. 13a. The same day, debtors entered into a merger agreement with Berkshire Hathaway Energy Company (Berkshire) for an amount *sub-*

stantially less than what the NextEra Merger Agreement would have provided to debtors' estates. See Jt. Plan (Bankr. D. Del. July 7, 2017), ECF No. 11426. Debtors later terminated the Berkshire agreement in favor of a proposal from Sempra Energy (Sempra). First Am. Jt. Plan of Reorganization (Bankr. D. Del. Aug. 23, 2017), ECF No. 11803. The Sempra deal, while superior to the Berkshire proposal, provided *materially less consideration* to debtors' estates than would have been provided under the NextEra Transaction. In other words, debtors never terminated to pursue "a higher and better offer." C.A. App. 485.[3]

E. The Bankruptcy Court Determines That The Approval Order Rested On A Manifest Error

Elliott realized that petitioner would attempt to collect the Termination Fee notwithstanding the PUCT's regulatory rejection. Thus, on July 29, 2017, Elliott sought reconsideration of the Approval Order to a limited extent: Elliott asked the bankruptcy court to provide that the Termination Fee would not be payable if petitioner failed to obtain PUCT approval and debtors were forced to terminate the NextEra Transaction to pursue an alternative transaction. Pet. App. 13a. Two days later, petitioner confirmed that it would seek the $275 million fee despite rejection by the regulator, filing an application with the bankruptcy court for allowance

[3] On February 27, 2018, the bankruptcy court confirmed a reorganization plan that included the Sempra transaction. See Order Confirming 1st Am. Jt. Plan (Bankr. D. Del.), ECF No. 12763. The transaction closed on March 9, 2018. Notice of Entry of EFH Confirmation Order & Occurrence of EFH Effective Date (Bankr. D. Del.), ECF No. 12801.

and payment of the Termination Fee. Significantly, as the Merger Agreement and Approval Order had specified, petitioner sought payment of the Termination Fee as "an administrative expense" if an alternative transaction were consummated. *Ibid.*; C.A. App. 1065-1102. Petitioner did not argue that the business judgment standard of Section 363 should apply.

The bankruptcy court granted the reconsideration motion because it determined that the Approval Order "was based on the serious misapprehension of the facts that constitutes manifest error." C.A. App. 1229. In a detailed opinion, the bankruptcy court explained that it "fundamentally misapprehended the facts" and, had it properly apprehended them, it would not have approved this specific Termination Fee as an administrative expense. Pet. App. 83a. Due to an "imprecise," "incorrect," "confusing," and "incomplete" record, the bankruptcy court "simply did not understand that if the PUCT declined to approve the NextEra Transaction and the Debtors (as opposed to [petitioner]) terminated the Merger Agreement the Termination Fee would be payable to [petitioner]." *Id.* at 48a, 74a-76a. In particular, the bankruptcy court did not understand that "if the PUCT declined to approve the NextEra Transaction," petitioner "had the ability to hold out * * * until the Debtors were forced by economic circumstances to terminate," triggering the $275 million fee. *Id.* at 77a. The court further held that, under those circumstances, the Termination Fee as originally approved would not qualify as an administrative expense "because there could not be any actual benefit to the Debtors' estate by payment of the fee." *Id.* at 49a. The bankruptcy court thus found that it made a "manifest error" in approving the Termination Fee as payable in those circumstances. *Ibid.*

On October 18, 2017, the bankruptcy court entered its order on reconsideration, finding that "[t]he Termination Fee Order must be modified because it approved a provision in the Merger Agreement that authorized the Debtors to pay [petitioner] the Termination Fee in circumstances in which the payment was not a necessary expense and the Debtors' estates would not receive an actual benefit, which is a manifest error of law." Pet. App. 42a-47a.

Critically, the bankruptcy court did not hold that *all* termination fees are impermissible or even that no termination fee was permissible here. Rather, it expressly limited its amendment to the "critical elements of the Termination Fee in this case" that created a perverse incentive for petitioner under these specific facts. Pet. App. 81a. For that reason, the bankruptcy court repeatedly distinguished "[t]he regular situation in which a termination fee provides an actual benefit," *i.e.*, "when the fee induces a bid that results in higher competitive bidding for the debtor's asset." *Id.* at 80a; see also *id.* at 81a (discussing "the more common circumstance of a request for a break-up fee in favor of a stalking horse bidder in an asset sale").

F. Proceedings On Appeal

After the parties jointly certified a direct appeal, see 28 U.S.C. 158(d)(2)(E), the court of appeals accepted jurisdiction and affirmed, holding that "the Bankruptcy Court did not abuse its discretion in granting" the reconsideration motion. Pet. App. 2a.

The court of appeals emphasized that, to affirm the bankruptcy court, it "need only conclude that the Bankruptcy Court committed a clear error of fact *or* law, as the relevant standard [for reconsideration] is disjunctive." Pet. App. 24a (citing *Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). The court held that the bankruptcy court committed an "obvious and indisputable" mistake of fact, Pet. App. 33a, deeming the analysis "relatively straightforward," *id.* at 26a. The court saw "no reason to second-guess the Bankruptcy Court's admission that it initially failed to recognize the absence of a deadline for PUCT approval, because there was no mention of any such deadline in Debtors' Approval Motion, the September 19 hearing testimony, or the September 25 letter." *Ibid.*

The court of appeals likewise affirmed the bankruptcy court's determination "that [the bankruptcy court's] previous factual error was a *clear or manifest* one that justified the partial denial of the Fee on a motion for reconsideration." Pet. App. 33a. Noting that it is "ultimately within a bankruptcy court's discretion to approve or deny a termination fee based on the totality of the circumstances of the particular case," the court of appeals held that the bankruptcy court's error of fact led it "to fundamentally misjudge the likelihood that the Termination Fee would be harmful to the estates." *Id.* at 30a-31a, 34a. Specifically, "[t]he Bankruptcy Court failed to initially recognize that" because "the Merger Agreement included no deadline by which PUCT approval had to be obtained before the deal would dissolve on its own, [petitioner] had little incentive to terminate the agreement first on its own volition" and instead "could simply wait for Debtors to terminate, which would trigger payment of the $275 million Fee." *Ibid.* "Under those circumstances, the Termination Fee would provide no benefit" to the estates and "would in fact be detrimental." *Id.* at 31a. The "Bankruptcy Court did not fully appreciate" when it "initially approved the Fee" that the Termination Fee "created substantial financial risk if the PUCT did not approve the transaction" that "had the possibility to be disastrous." *Id.* at 32a. That "risk was so great that the Fee was not necessary to preserve the value of Debtors' estates," so "the Bankruptcy Court did not abuse its discretion in denying the Fee in part." *Id.* at 33a.[4] Like the bankruptcy court, the court of appeals was careful to note that it was not disproving all termination fees, emphasizing that this Termination Fee worked "in a particular way," that there are at least three ways a termination fee could be justified as benefitting a debtor's estate, and that the bankruptcy court had only granted reconsideration "in part." *Id.* at 29a, 31a, 33a.

The court of appeals held that it "need not reach the question of whether the court also committed a manifest error of law." Pet. App. 33a n.7.

Judge Rendell dissented "reluctant[ly]," noting that, "[a]dmittedly, the facts of the case presented a difficult situation for the Bankruptcy Court." Pet. App. 36a. In her view, there "was no legal or factual error,"

[4] Petitioner claims that the "lower courts recognized that the Termination Fee presented a calculated *but justified* risk for the debtors." Pet. 5 (emphasis added). Each court said exactly the opposite, which is precisely why they disapproved the specific Termination Fee provision.

but "simply a failure to appreciate a particular set of potential consequences [that] became apparent in the light of day." *Id.* at 37a.

REASONS FOR DENYING THE PETITION

This case does not merit this Court's review. Indeed, it does not even present the question petitioner asks the Court to decide. Petitioner never requested the courts below to apply the "business judgment standard" of 11 U.S.C. 363, because petitioner had specifically agreed with debtors that the Termination Fee would constitute an "administrative expense * * * under the Bankruptcy Code." C.A. App. 182. Debtors sought approval of the Merger Agreement's Termination Fee provision under the agreed-upon "administrative expense" standard of 11 U.S.C. 503(b), it was approved as such, and petitioner sought payment as such. Petitioner cannot now argue that the lower courts erred by applying the Section 503(b) "administrative expense" standard when petitioner agreed to that standard in the Merger Agreement.

There is, in any event, no conflict between the courts of appeals regarding the standard for approving termination fees in bankruptcy. The Fifth Circuit case petitioner cites as establishing a circuit split did not even involve payment of a termination fee and expressly distinguished Third Circuit precedent on that basis, among others. *ASARCO, Inc.* v. *Elliott Mgmt. (In re ASARCO, LLC)*, 650 F.3d 593, 598, 602 (2011). No court of appeals has yet considered a termination fee fitting the archetypal mold that petitioner and its amicus point to, one approved ex ante as necessary to compensate a stalking-horse bidder for "costs and risks" to "attract[]

value that would otherwise never be available." Pet. 26. As such, there is no circuit split regarding the approval of fees in that context.

The standard of review would not, in any event, alter the outcome. The decisions below reflect that a typical termination fee will be approved under either standard, and was in fact approved here. By contrast, the particular provision that was rejected would fail under either standard. The bankruptcy court found, and court of appeals agreed, that the aspect of the Termination Fee it rejected could *only* work to the estate's disadvantage, and would "be disastrous" in certain circumstances (which eventually transpired). Pet. App. 32a. The courts' rejection of the extraordinary provision in question resulted from the "damage" it would do to the estates, and thus was not dependent on the standard of review.

Moreover, this case arises from a motion to reconsider, which would further prevent the Court from considering the issue cleanly. In resolving any motion to reconsider, a court inherently must engage in some degree of post-hoc analysis. Petitioner repeatedly faults the bankruptcy court for its after-the-fact assessment, claiming that it is a feature of the "administrative expense" analysis, as opposed to the "business judgment" standard of review. But it is impossible to disentangle the court's application of the administrative claim standard and the reconsideration posture in which it arose here. That would further complicate the Court's review and makes this case an especially poor candidate for certiorari.

I. THIS CASE DOES NOT PRESENT THE QUESTION ON WHICH PETITIONER SEEKS REVIEW, BECAUSE THE PARTIES AGREED BY CONTRACT TO THE "ADMINISTRATIVE EXPENSE" STANDARD

In this case, there is no opportunity for the Court to decide the question presented because the parties' own contract specified that "[t]he Termination Fee, to the extent approved by the Bankruptcy Court, shall constitute *an administrative expense of* [*the debtors*] *under the Bankruptcy Code*." C.A. App. 182 (emphasis added). By incorporating into the agreement the rubric of "an administrative expense * * * under the Bankruptcy Code," which refers to 11 U.S.C. 503—entitled "[a]llowance of administrative expenses"—petitioner waived any argument that the courts should have applied a *different* standard in deciding whether to approve the Termination Fee.[5]

Notably, when debtors sought approval of the Merger Agreement, debtors informed the bankruptcy court that, if debtors ultimately became liable for the Termination Fee, the Termination Fee would be payable "as an allowed administrative expense claim." Pet. App. 5a (citing C.A. App. 397-398). Debtors did not ask the court to apply the business judgment standard under 11

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[5] To be clear, respondents do not contend that petitioner was required to ask the bankruptcy court to overturn *O'Brien* or *Reliant Energy*. Here, however, the bankruptcy court did not simply apply the administrative claim standard based on circuit precedent. Petitioner voluntarily agreed in the Merger Agreement to that standard, which thus governs this case regardless of what standard might have applied otherwise.

U.S.C. 363 in place of the contractually agreed "administrative expense" standard under Section 503(b). As a consequence, the bankruptcy court's initial order authorized payment of the Termination Fee "as an allowed administrative expense to the extent it becomes due and payable pursuant to the terms and conditions of the Merger Agreement." Pet. App. 94a.

Similarly, after debtors had terminated the agreement, petitioner sought payment of the Termination Fee as "an administrative expense," as the Merger Agreement and Approval Order had specified. C.A. App. 1065-1102.

At no time prior to its petition for certiorari did petitioner, or any other party, argue that the courts should apply any standard *other* than the one to which petitioner had contractually agreed, which was the "administrative expense" standard of Section 503(b). Indeed, when an objecting party suggested at the Approval Hearing that debtors *might* be arguing for a business judgment standard, debtors' counsel affirmatively disavowed that notion, instead embracing "a clear 503(b)—or 503 standard." C.A. App. 574. Petitioner does not ask the Court to review whether the court of appeals applied the Section 503(b) standard correctly, nor could it reasonably do so. Section 503(b) authorizes the bankruptcy court to allow as "administrative expenses" the "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. 503(b)(1)(A). The bankruptcy court held, and the court of appeals agreed, that the particular aspect of the Termination Fee provision the bankruptcy court disallowed "was not necessary to preserve the value of Debtors' estates," Pet. App. 33a, because, in that circumstance, "the Termination Fee would provide no benefit" to the estates and "would in fact be detrimental," *id.* at 31a. There is no reason for the Court to review that fact-intensive determination as an application of Section 503(b)'s standard, and petitioner does not ask the Court to do so. Petitioner instead asserts that the court of appeals should have applied a *different* standard and reviewed the Termination Fee under 11 U.S.C. 363. But petitioner never made that argument below. And petitioner nowhere explains how the courts *could* apply Section 363, when the terms of the parties' Merger Agreement call for the courts to apply Section 503(b)'s "administrative expense" standard instead.[6] Petitioner has thus waived any argument that Section 363 should apply, and the petition for a writ of certiorari should be denied for that reason alone.

II. THERE IS NO CONFLICT THAT REQUIRES THIS COURT'S REVIEW, AND NO COURT OF APPEALS HAS RULED ON THE PARADIGMATIC STALKING-HORSE TERMINATION FEE PETITIONER CITES

Contrary to the contentions of petitioner and its amicus, there is no need for the Court to grant review in this case to resolve a purported circuit conflict regarding the standard by which bankruptcy courts should evaluate, ex ante, the use of break-up fees to encourage stalking-horse bids to facilitate higher bids in a bankruptcy asset sale. None of the four cases in the purported circuit split involves that fact pattern. Moreover, the Fifth

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[6] Notably, *ASARCO* never suggests that the Section 363 business judgment standard is appropriate for evaluating an "administrative expense," which is how the Merger Agreement characterized the Termination Fee here.

Circuit, which did not address a break-up fee at all, expressly denied a conflict with the Third Circuit. Thus, there is no conflict for this Court to resolve, especially as to the purportedly "typical" break-up fee context.

A. Each Third Circuit Decision Arose In Atypical Circumstances

Petitioner paints the Third Circuit's precedent as establishing a blanket rule that stands as an obstacle to "all requests for termination[] fees." Pet. 16 (alteration omitted) (quoting Pet. App. 28a n.4). Not so. Closer examination of the actual facts in *Calpine Corp.* v. *O'Brien Environmental Energy Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999), *In re Reliant Energy Channelview LP*, 594 F.3d 200 (3d Cir. 2010), and this case shows that each arose in a distinct posture different from the supposedly typical one posited by petitioner and its amicus, in which a bankruptcy court is considering, ex ante, a break-up fee "offered to potential bidders in asset sales 'as an inducement to make a bid or to hold a bid open.'" Pet. 2 (quoting 1 *Collier on Bankruptcy* ¶ 15.04 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2018)). To the extent the Third Circuit has commented on that scenario, it has suggested that a break-up fee should be approved in that circumstance.

1. In *O'Brien*, the fee request considered by the Third Circuit on appeal was sought *after* the auction concluded. Calpine Corporation initially entered into an agreement to acquire debtor O'Brien's assets that included "a break-up fee of $2 million," but "[t]he Bankruptcy Court refused to approve the break-up fee and expense provisions." 181 F.3d at 529. The court stated

that it would "permit Calpine to seek a break-up fee and expenses at the end of the process." *Id.* at 529-530. The parties agreed to new bidding procedures; Calpine participated again, despite the lack of a break-up fee provision, but was not the successful bidder. Calpine nonetheless "filed an Application for Payment of Fees and Expenses Pursuant to 11 U.S.C. § 503(b), seeking a $2 million break-up fee, $2,250,000 in break-up expenses, and interest." *Ibid.* The court denied the application. *Ibid.*

The Third Circuit affirmed denial of Calpine's post-bid application. The court of appeals reviewed *only* Calpine's fee application made *after* the sale, and *after* facts had demonstrated that a break-up fee was not necessary to entice Calpine to participate (unsuccessfully) in the bidding. In that circumstance, the Third Circuit agreed that "awarding Calpine break-up fees was not necessary to preserve the value of O'Brien's estate." 181 F.3d at 536. Crucially, "Calpine failed to make any * * * showing" that "Calpine's bid served as a catalyst to higher bids." *Id.* at 537.

2. *Reliant Energy* likewise did not involve the stalking-horse paradigm, and a break-up fee was demonstrably *not* necessary to spark bidding. There, the asset to be sold was a power plant, and Kelson Channelview LLC (Kelson) won the initial round of bidding and entered into a purchase agreement. 594 F.3d at 202-203. The agreement provided that, "if the [bankruptcy] [c]ourt determined that there should be an auction," Kelson would be protected by "a $15 million break-up fee * * * as well as reimbursement for expenses." *Id.* at 203. Before the court ruled on the requested protections, another bidder "objected * * * and asserted that it was

willing to enter a 'higher and better' bid at an auction, but the $15 million break-up fee along with the $2 million reimbursement for expenses would be a deterrent." *Ibid.* The bankruptcy court approved reimbursement of Kelson's expenses but declined to approve the break-up fee. It reasoned that the break-up fee was demonstrably not necessary "to get other bidders * * * to the table," given that another, higher bidder had already emerged. *Id.* at 204.

The Third Circuit affirmed, holding that a break-up fee was not needed "to entice [Kelson] to bid" or "to assure that Kelson adhered to its bid." *Reliant Energy*, 594 F.3d at 207-208. Thus, *Reliant Energy* also did not involve a typical stalking-horse situation—Kelson "made its bid before the auction knowing that it might not receive a break-up fee, and a retroactive grant of a break-up fee could not have induced a bid that Kelson already had made." *Id.* at 208.

3. The instant case is also unique, because it involves a highly unusual provision that the court fundamentally misunderstood. The bankruptcy court *approved* the Termination Fee as initially proposed, when debtors and petitioner sought approval of the Merger Agreement. Pet. App. 51a. But the bankruptcy court granted approval only because it was misinformed about an atypical term that created a perverse incentive: petitioner "had the ability to hold out and to pursue numerous motions for reconsideration and a fruitless appeal until the Debtors were forced by economic circumstances to terminate the Merger Agreement." *Id.* at 77a. "If the [bankruptcy] [c]ourt had understood these critical facts it would not have approved this provision of the Termination Fee." *Ibid.* The court of appeals affirmed,

noting that the bankruptcy court's "error of fact was obvious and indisputable," and that it could not find an abuse of discretion in concluding, based on "a complete understanding" that "the potential benefit [to the estate] was outweighed by the harm that would result under predictable circumstances." *Id.* at 33a.

Therefore, no Third Circuit case has addressed the situation that petitioner and amicus hold out as the so-called typical one, in which the bankruptcy court approves the estate's agreement at the outset to pay a break-up fee as the necessary cost to entice a stalking-horse bid, that could then spur competitive bidding and ultimately a higher purchase price. NABT Amicus Br. 3, 13. Tellingly, to the extent that situation was present in this case, the bankruptcy court *approved* the break-up fee, consistent with the Third Circuit's implicit endorsement in *O'Brien*, 181 F.3d at 537. That precise type of provision is the one ultimately approved by the bankruptcy court here after reconsideration, C.A. App. 8, as well as in the Sempra agreement that was also later approved, see Order Authorizing Entry into Merger Agreement and Approving Termination Fee, Ex. A, § 8.5(b) (Sept. 7, 2017), ECF No. 11873 (Sempra Order). Thus, to the extent petitioner and its amici suggest that the Third Circuit would not routinely permit a debtor to agree to a typical stalking-horse break-up fee, they mischaracterize the Third Circuit's decisions.

B. The Fifth Circuit In *ASARCO* Expressly Disclaimed A Conflict With The Third Circuit

The Fifth Circuit's decision in *ASARCO, Inc.* v. *Elliott Management (In re ASARCO, LLC)*, 650 F.3d 593 (2011), expressly disclaimed any circuit split with the

Third Circuit, noting that it faced a different factual circumstance. *ASARCO* did not involve a break-up fee at all, but instead concerned the bankruptcy court's ex ante approval of reimbursement by the estate for expenses incurred by any potential second-round bidders to conduct due diligence on the debtor's primary asset. That asset was a judgment against the debtor's former corporate parent, which was "very unique and very valuable but possibly worthless" and required considerable specialized diligence. *Id.* at 602 (citation omitted). The due diligence "entail[ed] highly sophisticated legal analysis—and thus substantial legal costs—and [the debtor] believed it necessary to provide bidders with an incentive to undertake this investment." *Id.* at 598. The bankruptcy court approved the request under 11 U.S.C. 363 "*before* any potential qualified bidders * * * had incurred due diligence and work fees." *Id.* at 598, 602.

The Fifth Circuit affirmed, holding that the bankruptcy court correctly applied Section 363 instead of Section 503(b). *ASARCO*, 650 F.3d at 601-603. The Fifth Circuit was "not persuaded that *Reliant* and *O'Brien* [were] apt where * * * a debtor requests the authority to reimburse expense fees for second-round qualified bidders in a multiple stage auction for a very unique and very valuable but possibly worthless asset." *Id.* at 602 (internal quotation marks and citation omitted). The court held that "the break-up fee provisions at issue in *Reliant Energy* and *O'Brien* significantly differ[ed] from the due diligence reimbursement fees" for at least three reasons: the break-up fees in *Reliant Energy* and *O'Brien* "were to be paid only if the prospective bidder was unsuccessful," while in *ASARCO* "prospective (and qualified) bidders could be reimbursed regardless of whether they were ultimately successful." *Ibid.* Moreover, in the Third Circuit cases, the bankruptcy courts "refused to approve the break-up fee in part due to the concern that the fee would" have a chilling effect on bidding, but in *ASARCO* the debtor "sought to *increase* competition by providing bidders an incentive to undertake the costly but necessary due diligence." *Ibid.* And, finally, "[t]he unsuccessful bidders in *O'Brien* and *Reliant Energy* sought payment for expenses incurred without the court's pre-approval for reimbursement," while in *ASARCO*, "the bankruptcy court issued the Reimbursement Order *before* any potential qualified bidders * * * had incurred due diligence and work fees." *Ibid.*

Given the pains to which the Fifth Circuit went to distinguish the facts of *ASARCO* from the Third Circuit cases, petitioner's assertion of "a stark conflict" between the two circuits, *e.g.*, Pet. 19, is petitioner's own projection. It is telling that petitioner labors to dismiss the differences identified by the Fifth Circuit as "distinction[s] without a difference," *id.* at 19-21, when plainly the Fifth Circuit did not think so.[7] And, most significantly, neither

[7] Nor is there any merit to petitioner's attempt to bolster the illusory claim of divergence between the Third and Fifth Circuits with reference to other district and bankruptcy court cases that characterize the two courts as being in tension. Pet. 21-25. Petitioner's reliance on New York district court opinions is further inapposite, given its concession that the Second Circuit has not addressed the question. *Id.* at 21-24. Petitioner points to no case where the standard of review would be outcome determinative. Tellingly, the fee approved in petitioner's "lead" Southern District of New York case was identical in relevant part to the *amended*, post-reconsideration Termination Fee here: "the Break-Up Fee *would not be payable* if [the buyer] * * * *is unable to obtain any necessary regulatory approvals*." *Official Comm. of Subordinated*

court of appeals has addressed the supposedly paradigmatic stalking-horse situation to "establish a benchmark for a subsequent auction and encourage more bids by allowing other bidders to rely on the due diligence of the stalking horse bidder." NABT Amicus Br. 13. Petitioner simply cannot succeed in creating a circuit split where the Fifth Circuit has expressly disclaimed it and where none exists.

Finally, petitioner's reliance on Judge Rendell's dissenting opinion in this case to demonstrate a conflict with the Fifth Circuit, see Pet. 11, 21, is misplaced. While Judge Rendell's dissenting opinion makes clear that she believed the bankruptcy court should not have revisited "a previously approved term of a deal," Pet. App. 40a, nowhere did she advocate for a business judgment standard. If she had, she would not have referred to this case as involving "a 'double' § 503 analysis." *Ibid.*

III. THE DECISION OF THE COURT OF APPEALS IS CORRECT ON THESE UNIQUE FACTS, UNDER EITHER STANDARD

The bankruptcy court's ruling on reconsideration, affirmed on appeal, is narrow: the bankruptcy court disallowed only the portion of the Termination Fee where

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Bondholders v. *Integrated Resources, Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650, 655 (1992) (emphases added). Clearly, then, that does not suggest a conflict with the Third Circuit's decision here. Finally, the suggestion that the Second Circuit will not have a chance to weigh in is disproved by that Court's previously expressed willingness to review this issue on interlocutory appeal "in an appropriate case." See *In re Integrated Resources, Inc.*, 3 F.3d 49, 53 (1993).

"the PUCT declines to approve the transaction contemplated in the Merger Agreement and, as a result, the Merger Agreement is terminated," regardless of which party terminated. Pet. App. 44a. The bankruptcy court left in place other aspects of the fee provision, ordering that "[t]he Termination Fee is otherwise approved." *Id.* at 44a-45a. Each aspect of this ruling—the part of the break-up fee the court approved, and the part it rejected—would have been the same under either proposed standard.

A. Paradigmatic Termination Fees Are Allowed Under Either Standard, As This Case Shows

Petitioner would have the Court ignore the fact that the courts below *approved* a break-up fee of precisely the type petitioner contends would be rejected under the administrative expense standard. In its revised order, the bankruptcy court approved a break-up fee just like the one hypothesized by petitioner and its amicus: a fee payable if debtors broke off their agreement with petitioner to pursue a better offer. Pet. App. 44a-45a. There is thus no basis for petitioner's suggestion that application of the Section 503(b) standard would routinely prevent approval of such terms.

Indeed, the bankruptcy court approved such traditional break-up fees on multiple occasions in this case. While the reconsideration proceedings were pending, Sempra submitted a merger proposal containing a termination fee provision (without the extraordinary feature of the NextEra provision) that the court approved under an administrative expense standard. See Sempra Order § 8.5(b). That provision, like the revised NextEra termination fee, addresses the "regular situation" discussed by the bankruptcy court: "when the [termination] fee induces a bid that results in higher competitive bidding for the debtor's asset." Pet. App. 80a. That "regular situation" was the focus of the parties' presentation at the initial Approval Hearing, which noted the fee would be payable if debtors terminated to pursue "higher or otherwise better offers." C.A. App. 398, quoted at Pet. App. 5a. Indeed, at the initial Approval Hearing, "[n]o mention was made of any instance when the Termination Fee could be triggered *in the absence of* a higher or better alternative transaction." Pet. App. 54a (emphasis added). Rather than questioning the value of break-up fees in those typical circumstances, the bankruptcy court recognized that such fees establish a party as stalking horse and compensate it for the "substantial investment of time and effort" made as "the initial bidder." Pet. 26 (quoting 1 *Collier on Bankruptcy* ¶ 15.04); Pet. App. 82a ("Allowance of a termination or break-up fee when a debtor chooses to pursue a higher and better offer is appropriate.").

Petitioner's suggestion that the standard for approval would be outcome determinative in a typical case thus lacks any factual basis. Petitioner's speculation (Pet. 4) that an administrative expense standard "inevitably chills potential bidders" is similarly refuted by its own behavior. Petitioner, fully aware that an administrative expense standard would apply to its Termination Fee (both by the terms of the Merger Agreement and circuit precedent), submitted a merger proposal for more than $9.5 billion in consideration. And the bankruptcy court's approval of a traditional termination fee in the Sempra agreement further confirms that such fees will be approved under Section 503(b), just as they would under Section 363.

B. The Extraordinary Aspects Of The Termination Fee Would Be Rejected Under Either Standard

Notably, neither petitioner nor its amicus provides any reason to believe that the disapproved portion of the Termination Fee—which could only harm the estates—would be allowed under a business judgment standard. When fully apprised of its nuances, the bankruptcy court rejected only the portion of the Termination Fee that "had the possibility to be disastrous." Pet. App. 32a. That provision perversely "incentivized [petitioner] to pursue multiple motions for reconsideration and a fruitless appeal strategy to force the Debtors to terminate the Merger Agreement to pursue an alternative transaction," all while the estate burned through its assets, making them unavailable to the estate's creditors. *Id.* at 82a.

No court has ever found such a fee payable, under any standard. Indeed, neither petitioner nor its amicus asserts that the particular features of the termination fee the bankruptcy court rejected are common. Even under a business judgement standard, the bankruptcy court would be required to review a merger agreement's specific terms to ensure that the Termination Fee was "fair, reasonable, and appropriate" and "in the best interests of [the debtor] and its estate, creditors, interest holders, stakeholders, and all other parties in interest." *ASARCO*, 650 F.3d at 603 (citation omitted). Petitioner provides no reason to believe a bankruptcy court would approve a term that could only "be harmful" or even "disastrous" to the estates, even under that purportedly more deferential standard. Pet. App. 32a, 34a. And to the extent petitioner's complaint concerns the retrospective aspect of the bankruptcy court's assessment, that is a product of the case's reconsideration posture, not the standard applied. See *infra* Part IV.

There is every indication, then, that result would be the same under either standard, whether in the "regular" case or an "extraordinary" one. If there is ever a case when the standard may be dispositive and a genuine conflict among the circuits, the Court could grant review at that time. While petitioner raises the prospect that further court of appeals decisions addressing termination fees are unlikely, that is mere speculation. If the issue is truly "of substantial importance" and "arises frequently," implicating "billions of dollars of value," Pet. 26-29, an aggrieved litigant will certainly seek review by the court of appeals pursuant to 28 U.S.C. 158(d)(2) or 1292(b). See *In re Integrated Resources, Inc.*, 3 F.3d 49, 53 (2d Cir. 1993) (inviting petition for interlocutory review "in an appropriate case").

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW BECAUSE IT INVOLVES A MOTION TO RECONSIDER

The petition should be denied for the additional reason that the posture of the lower court rulings—granting a motion for reconsideration based on "a fundamental misapprehension of critical facts," Pet. App. 48a-49a—makes this case a particularly poor vehicle to resolve the question presented.

Petitioner criticizes the decisions applying Section 503(b) as authorizing "hindsight-based judicial second-guessing," contrasting them to cases deferring to "the debtor's *ex ante* business judgment." *E.g.*, Pet. 5. Even if the two approaches actually conflicted—which they do not, for the reasons discussed *supra*—evaluation of the supposed hindsight-based approach is inevitably complicated here by the fact that "judicial second-guessing" is impossible to avoid in evaluating a motion for reconsideration. All of petitioner's complaints about the bankruptcy court's post hoc reasoning stem from the case's peculiar procedural posture: As the court of appeals correctly recognized, "an 'after-the-fact assessment' is inevitable in the context of a motion for reconsideration, and the [bankruptcy] court did not act 'as if no initial approval had been granted.'" Pet. App. 33a n.6 (quoting *id.* at 39a (Rendell, J., dissenting))

Indeed, both courts below took pains to emphasize repeatedly that this case is sui generis. The bankruptcy court made clear several times that it was taking an "extraordinary step[,] which it d[id] not do lightly." Pet. App. 48a; see also *id.* at 49a, 85a. The court of appeals likewise held that the fact "[t]hat the heightened standard was satisfied here is in and of itself proof that this case is anomalous." *Id.* at 34a. "Reconsideration was warranted only because the Bankruptcy Court failed to discern a critical fact that profoundly altered the underlying legal determination. If we were presented with anything less, our conclusion may very well have been different." *Ibid.* That is why it is particularly significant that the court of appeals affirmed based on a manifest error of fact and expressly declined to reach the alternative ground for affirmance of a manifest error of law. *Id.* at 33a n.7.

Petitioner and its amicus advocate a rule that would apply in a situation distinct from the one presented here, and distinct from the contexts of *O'Brien*, *Reliant Energy*, and *ASARCO*: they contend that, when the bankruptcy court is making a *predictive* determination as to whether approval of a break-up fee is likely to benefit the estate, the bankruptcy court should grant substantial deference to the "sound judgment of the trustee" or debtor in possession. *E.g.*, NABT Amicus Br. 16. To the extent that ex ante analysis took place here, the court was explicitly asked to apply the "administrative expense" paradigm of Section 503(b), because that was the standard the parties adopted in their negotiated Merger Agreement. C.A. App. 182. The court's ex ante analysis was frustrated by what the bankruptcy court later realized was "an incomplete and confusing record" on "the critical fact that NextEra had no economic incentive to terminate the Merger Agreement." Pet. App. 74a, 78a. That "critical fact," which the bankruptcy court initially misapprehended, meant that petitioner "had the ability to hold out * * * until the Debtors were forced by economic circumstances to terminate the Merger Agreement," wasting estate assets all the while. *Id.* at 77a. When Elliott brought the court's attention to its error, the bankruptcy court had no choice but to reassess its initial analysis. Petitioner's complaints about any purportedly improper retrospective analysis are simply a product of petitioner's own failure to clarify the terms of the agreement in a timely fashion: petitioner was present at the Approval Hearing but stayed silent, C.A. App. 461-462, and petitioner was a signatory to the September 25 Letter that failed to correct the court's misunderstanding, C.A. App. 702-703.

* * * * *

As noted above, petitioner's contractual agreement to have the Termination Fee assessed under the "administrative expense" framework of Section 503(b) precludes it from arguing (for the first time) in this Court that the fee should have been assessed using a purportedly more deferential standard under Section 363. But, even setting aside petitioner's waiver, this Court's review should await an actual divergence in the decisions of the courts of appeals in a case involving the paradigmatic break-up fee, not an extraordinary fee provision presented in a uniquely complicated procedural circumstance. Even petitioner does not contend that this case's particular confluence of fee provision and procedural history is ever likely to repeat itself.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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